Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

TERENCE KEVIN BETHEA,

Petitioner,

v.

UNITED STATE PAROLE COMMISSION AND FEDERAL BUREAU OF PRISONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

Did *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), implicitly overrule the rule of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), that a nonmovant can defeat a motion for summary judgment without making any factual showing, if the movant has failed to establish the absence of a factual dispute?

PARTIES TO THE PROCEEDING

Petitioner
Terence Kevin Bethea

Respondents
United States Parole Commission
Federal Bureau of Prisons

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The opinion of the U.S. Court of Appeals for District of Columbia Circuit (Pet. App. 2a-5a) is not reported, but can be found at 2003 U.S. App. LEXIS 3901 (D.C. Cir. Mar. 3, 2003). The decision of the U.S. District Court for the District of Columbia granting Respondents' motion to dismiss (Pet. App. 6a-15a) and the order of the district court entering judgment for Respondents (Pet. App. 16a) are not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 3, 2003. Petitioner (along with the court-appointed *amicus curiae* in the court of appeals) timely filed a petition for rehearing and for rehearing en banc on April 17, 2003. The court of appeals denied the petition for rehearing and for rehearing en banc on May 2, 2003. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

FED. R. CIV. P. INVOLVED

Federal Rule of Civil Procedure 56 provides in full as follows:

Rule 56. Summary Judgment

(a) **For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time,

move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by dispositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT

1. Mr. Bethea, a prisoner in federal custody proceeding *pro se* in the lower courts, brought suit in the district court against the United States Parole Commission ("Commission") and the Federal Bureau of Prisons ("BOP"), alleging that the BOP violated the Privacy Act, 5 U.S.C. § 552a, by willfully using inaccurate records to establish his security classification while he was in custody at the Allenwood federal prison in Pennsylvania. In a series of earlier decisions, the court of appeals has established that, under the Privacy Act, a prisoner may sue federal agencies where they have, through willful use of inaccurate or incomplete records, made an adverse determination concerning the prisoner during confinement. *See Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583-86 (D.C. Cir. 2002); *Deters v. United States Parole Comm'n*, 85 F.3d 655, 657-61 (D.C. Cir. 1996); *Sellers v. Bureau of Prisons*, 959 F.2d 307, 310-12 (D.C. Cir. 1992).

Mr. Bethea's contention is that, notwithstanding the ready availability in the Commission's own files and elsewhere of records evincing the dismissal of certain charges of sexual offense and prison escape, the BOP – in setting his security classification at the highest level (including initially placing him in what amounted to solitary confinement) – selectively used only records that nowhere indicated those charges had been dismissed or not pursued. Compl. 3, 11-12, 15, 17 (C.A. App. 7, 15-16, 19, 21); Bethea's Opp. in D. Ct. to Defs.' Mot. to Dismiss 6 (C.A. App. 232). In using faulty records, Mr. Bethea asserts that the BOP acted "*willfully and intentionally*" and "deliberately" because of bias against D.C. prisoners, whom he says the BOP deems more dangerous than other prisoners, and against African-Americans. Compl. at 3, 12 (C.A. App. 7, 16) (emphasis in original); Appellant's Br. in C.A. 8.

2. Soon after the filing of the complaint, Mr. Bethea sought, by motion, discovery on his claims. *See* Bethea's Mot. in D. Ct. for Disc. Pursuant to Fed. R. Civ. P. 34 and 26. In that motion, Mr. Bethea asserted that the documents he requested "will prove that the defendants have '*willfully and intentionally*' used incredibl[e], unverifi[ed] documents as fact when the . . . truth could be easily verified, and ascertain[ed], but the defendant chose not to." *Id.* at 2 (emphasis in original). The Commission and the BOP responded with a motion for a protective order, on the grounds that they would be filing "a dispositive motion [that] may obviate the expense and effort of discovery entirely." Defs.' Mot. in D. Ct. for Prot. Ord. 2. Ultimately, the district court granted the motion for protective order and denied Mr. Bethea's discovery motion. D. Ct. Ord. of Aug. 2, 2001.

The Commission and the BOP then filed what they denominated as "Defendants' Motion to Dismiss." There, they maintained that Mr. Bethea was suing both the Commission to challenge a denial of parole and the BOP concerning his security classification, *see* Pet. App. 22a-23a, though they have since conceded that the complaint actually sought to challenge just the security classification. *See* Appellees' Br. in C.A. 15-16. The Commission and the BOP did not file the listing of undisputed material facts that, under the district court's rules, must accompany their motion if it were a summary judgment motion. D.D.C. Local Civ. R. 7.1(h).

In the motion to dismiss, the Commission argued, among other things, that the purported claim against it involving parole should have been dismissed on the merits, because – according to it – the Commission fully investigated Mr. Bethea's claims of inaccurate records and gave him an opportunity to contest the record, prior to determining his parole eligibility. Pet. App. at 32a-33a. In support of this argument, the Commission cited and attached the entirety of

the Commission's parole file. *Id.* at 32a; *see also* C.A. App. 123-92 (parole file).

With respect to Mr. Bethea's claim that the BOP willfully used inaccurate records to fix his security classification, the BOP raised various arguments, only one of which is relevant for present purposes: the BOP challenged Mr. Bethea's allegations concerning whether it acted willfully. The sum total of the BOP's presentation on willfulness was as follows:

> In any event, BOP did not act without grounds for believing its actions were lawful, or with a flagrant disregard for plaintiff's Privacy Act rights. *See Albright v. United States*, 732 F.2d 181, 189-90 (D.C. Cir. 1984); Pl. Ex. K. Assuming, *arguendo*, that Mr. Bethea could satisfy the other prerequisites for a cause of action pursuant to 5 U.S.C. § 552a(g)(4), he has not alleged – nor can he allege – facts to support a finding of an intentional action or willful intent in maintaining the challenged records. He cannot show that BOP has maintained the challenged records in any manner other than as a legitimate effort to collect and preserve relevant information in the course of its duties.

Pet. App. 34a.

Other than citing to "Pl. Ex. K," the BOP cited no other documentation, and attached no additional material to the dismissal motion, to support its allegations on lack of willfulness. Plaintiff's Exhibit K, which Mr. Bethea attached to the complaint, consists of scattered excerpts of the BOP's official manual on how to calculate prison security classifications. *See* C.A. App. 71-93.

Mr. Bethea subsequently filed an opposition to the motion to dismiss, attaching various documents. *See* C.A. App. 227-46. The Commission and the BOP filed a reply, but included no further evidence. The district court, by order, informed

Mr. Bethea that, "[b]ecause Defendants' motion relies in part on matters outside the pleadings it may be treated as one for summary judgment." D. Ct. Ord. of Aug. 2, 2001, at 1. Mr. Bethea subsequently filed a surreply, but no additional evidence.

3. The district court granted the motion to dismiss. It held that Mr. Bethea had "failed to establish" a Privacy Act claim. Pet. App. 14a. Apparently acting on the mistaken belief that the case involved the Commission's parole determination, the district court focused on the records the Commission had before it when making the parole decision, rather than the records that *the BOP* used when fixing the security classification. *Id.* at 13a-14a. Finding *the Commission's* records sufficiently accurate and that "the *Parole Commission* deferred its decision until it could obtain additional information" about the sexual offense and escape charges, the district court then declared that both the Commission *and* the BOP used accurate records and did not willfully violate the Privacy Act. *Id.* at 14a (emphasis added).

4. On appeal, the court of appeals, in a decision not challenged here, summarily affirmed the district court's ruling with respect to any claim against the Commission concerning parole eligibility. However, it set for briefing and oral argument the question of whether the BOP violated the Privacy Act in fixing the security classification.

In a decision rendered on March 3, 2003, the court of appeals affirmed the district court's ruling on the claim against the BOP. Ignoring the fact that Mr. Bethea had never had opportunity for discovery, the court of appeals affirmed the district court's ruling concerning the BOP solely for the reason that Mr. Bethea, in court of appeals' view, "did not set out a sufficient factual basis to show that the Bureau's conduct was 'willful' within the meaning of the statute." Pet. App. 4a. On this score, the court of appeals adopted a

line of reasoning based on the parties' relative burdens under summary judgment practice that was not even advanced by the BOP. The court of appeals stated:

> Anticipating possible reliance on materials beyond the pleadings in ruling on the Bureau's motion to dismiss, which attached an affidavit and various documents, the district court advised the parties that the motion would be treated as a motion for summary judgment. . . . [T]he district court . . . advised Bethea, who was proceeding *pro se*, of the requirements under Fed. R. Civ. P. 56, including that he could not rely on the allegations in the complaint in opposing the motion to dismiss. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26 (1986); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C. Cir. 1988). In the memorandum accompanying its motion to dismiss, the Bureau maintained that Bethea could show neither that records allegedly missing from the Bureau's file would have altered his security classification nor that the Bureau intentionally and willfully violated Bethea's rights under the Privacy Act. Because summary judgment analysis considers documents beyond the pleadings, Bethea had an obligation to offer evidence supporting his claim that the Bureau acted willfully and intentionally. Bethea, however, presented no new information and relied solely on the factual allegations in his complaint, his opposition to the motion to dismiss raising purely legal issues. Because Bethea thus failed to demonstrate that a material issue of disputed fact exists regarding whether the Bureau had "acted intentionally or willfully in failing to maintain accurate records," an element of his Privacy Act claim, . . . the district court properly concluded that his lawsuit for damages could not survive.

Pet. App. 4a-5a.

The court of appeals had presaged during oral argument that it might decide the case based on the standards for summary judgment practice. As a result, immediately following oral argument, the court-appointed *amicus curiae* supporting Mr. Bethea sought leave to file a supplemental brief on the parties' respective burdens under Fed. R. Civ. P. 56, believing that no party had addressed the topic in its briefing (given that the district court had granted a motion to dismiss). The court of appeals did not act on that motion prior to issuing its decision, instead denying it as moot upon the decision's issuance. Mr. Bethea (and the court-appointed *amicus curiae*) subsequently sought rehearing and rehearing en banc, asserting that the shifting of the summary judgment burden to Mr. Bethea, considering the state of the record and the BOP's presentation, was inconsistent with *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The court of appeals denied the petition.

REASONS FOR GRANTING THE PETITION

In the seventeen years since this Court decided *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the lower courts have often struggled with whether a nonmovant who makes no evidentiary showing can defeat a summary judgment motion that otherwise is unsupported. In its earlier decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court held that a nonmovant need show nothing to avoid summary judgment, if the movant's presentation fails to foreclose the existence of disputed issues of material fact. In *Celotex*, however, the Court ruled in favor of a movant who had presented no affirmative evidence in support of its motion, because the nonmovant's showing in response to the motion was deficient. Commentators have noted the tension between *Adickes* and *Celotex*. *See infra* pp. 19-20.

This case turns on whether *Adickes* survives *Celotex*. Up until now, the courts of appeals that have addressed the issue have sought to harmonize the decisions, particularly because

Celotex, on its face, did not purport to overturn *Adickes*. They have held that *Adickes* remains good law and that *Celotex* is limited to situations where discovery has been substantially completed. In this case, however, the court of appeals took a decidedly different approach: its decision effectively assumes that *Celotex* overruled *Adickes* and thus that, in all instances, a nonmovant must make some affirmative showing when faced with a summary judgment motion, even when there has been no discovery (and discovery actually had been foreclosed). In order to resolve the conflict among the circuits, and indeed to clear up confusion that has plagued summary judgment practice since *Celotex*, the Court should grant certiorari.

A. The Court of Appeals' Decision Assumes That *Celotex* Overruled *Adickes*

1. Deciding the case solely on the issue whether the BOP *willfully* used inaccurate records in setting Mr. Bethea's security classification, the court of appeals ascribed to Mr. Bethea the burden of production on the BOP's summary judgment motion. The court of appeals said that, once the BOP "maintained that Bethea could [not] show . . . that the Bureau intentionally and willfully violated Bethea's rights under the Privacy Act," Mr. Bethea "had an obligation to offer evidence supporting his claim that the Bureau acted willfully and intentionally." Pet. App. 4a-5a. In the court of appeals' view, the burden shifted to Mr. Bethea "to demonstrate that a material issue of disputed fact exists regarding whether the [BOP] had 'acted intentionally or willfully,'" when the BOP sought summary judgment. *Id.* at 5a. Because he "presented no new information and relied solely on the factual allegations in his complaint," the panel affirmed the grant of summary judgment to the BOP. *Id.*

In shifting the burden to Mr. Bethea, the court of appeals contravened this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In that case, the plaintiff sued a

restaurant alleging, among other claims, that it conspired with the local police to discriminate against her in violation of 42 U.S.C. § 1983. The lower courts awarded summary judgment on the claim, under the theory that "there was 'no evidence in the complaint or in the affidavits and other papers from which a "reasonably-minded person" might draw an inference of conspiracy.'" *Adickes*, 398 U.S. at 153 (quoting district court decision in case). When filing the motion, the restaurant had proffered affidavits suggesting that there had been no communication between the restaurant's employees and the police during the relevant incident. The plaintiff, in response, relied largely on "circumstantial evidence" and her own allegations. *Id.* at 157.

Reversing the lower courts, this Court held that, "[a]s the moving party, respondent [*i.e.*, the restaurant] had the burden of showing *the absence* of a genuine issue as to any material fact." *Id.* at 157 (emphasis added). The Court expressly rejected the moving party's argument that "it was incumbent on petitioner [*i.e.*, the nonmovant] to come forward with an affidavit properly asserting the presence of [a] policeman in the store, if she were to rely on that fact to avoid summary judgment." *Id.* at 159. Pointing to the Advisory Committee notes to Fed. R. Civ. P. 56, the Court emphasized: "[I]n a comment directed specifically to a contention like respondent's, the Committee stated that 'where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*'" *Id.* at 160 (quoting Advisory Committee Note on 1963 Amendment to subd. (e) of Fed. R. Civ. P. 56) (emphasis in original). "Because respondent did not meet its initial burden of establishing the absence [of a genuine issue of material fact], petitioner here was not required to come forward with suitable opposing affidavits." *Id.*

The court of appeals' decision in Mr. Bethea's case is inconsistent with these principles. Under *Adickes*, it was the BOP's burden in the first instance to show the absence of any issue of material fact as to willfulness. Absent the BOP foreclosing the presence of any disputed facts, Mr. Bethea had no burden at all; he could stand, as he did, entirely on the allegations of his complaint. It was not sufficient simply for the BOP to have asserted or "maintained" that Mr. Bethea could not prove his case in order for the burden to shift to him to present affidavits or other evidence. Pet. App. 4a. He could defeat the motion by presenting nothing, if the BOP failed at the outset to establish the non-existence of issues of material fact.

In this instance, the BOP – in its motion – failed to establish the absence of any issue of material fact as to whether it willfully used inaccurate records to establish Mr. Bethea's security classification. The issue of willfulness involves the BOP's state of mind, a particularly difficult area in which to foreclose the presence of disputed issues. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). Yet, the BOP's presentation on willfulness consisted of a single paragraph and contained only two citations – one to *Albright v. United States*, 732 F.2d 181, 189-90 (D.C. Cir. 1984), and one to Plaintiff's Exhibit K to the complaint. *See* Pet. App. 34a. Plaintiff's Exhibit K comprised scattered pages of the BOP manual on security classifications. C.A. App. 71-93. That manual in no manner addresses the BOP's mindset in Mr. Bethea's individual case, let alone shows indisputably that the BOP did not act willfully.

It is true that the BOP and the Commission did present with their motion the Commission's records as to the parole proceedings. But that evidence related only to whether the Commission violated the Privacy Act in its parole eligibility determination (a claim that Mr. Bethea, in fact, had not raised). On the issue of the BOP's willfulness, the only

evidence on which the BOP rested was Plaintiff's Exhibit K, which was simply portions of a BOP official manual. The BOP did not offer, for instance, any affidavits from the prison officials responsible for setting Mr. Bethea's security classification, in any effort to prove that they had acted legitimately; nor did the BOP offer any sort of data to show that D.C. or African-American prisoners generally had fared no worse in their security classifications than other prisoners, so as to attempt to negate Mr. Bethea's allegation that the BOP willfully used inaccurate records due to bias against him.

Because the BOP failed to make an evidentiary presentation establishing the absence of any dispute that it acted willfully in Mr. Bethea's situation, Mr. Bethea's failure to present evidence in response is of no moment. Under *Adickes*, Mr. Bethea should have prevailed.

2. The court of appeals apparently believed that summary judgment was compelled by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Indeed, of this Court's decisions, the court of appeals relied solely on *Celotex*. *See* Pet. App. 4a.

In *Celotex*, the administratrix of an estate filed a wrongful death action against an asbestos manufacturer, asserting that the decedent had died prematurely due to exposure to the manufacturer's asbestos products. A year later, and after significant discovery, the manufacturer moved for summary judgment, but submitted no supporting affidavits of its own. Instead, it asserted that, during discovery, the administratrix had produced no evidence to support her allegation that the decedent had been exposed to the manufacturer's products. Though the district court granted the motion, the court of appeals – the same court of appeals involved in Mr. Bethea's case – reversed. The court of appeals in *Celotex* relied on the "decision in *Adickes*" for the proposition that "'the party opposing the motion for summary judgment bears the burden

of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.'" *Celotex*, 477 U.S. at 321 (quoting court of appeals' decision) (emphasis in original).

This Court then reversed the court of appeals. The Court held: "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "[U]nlike the Court of Appeals," this Court found "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323 (emphasis in original).

Addressing *Adickes*, the Court in *Celotex* said it did "not think [*Adickes*] should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead . . . the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325 (quoting Fed. R. Civ. P. 56(c)).

The Court also considered whether further discovery was necessary prior to summary judgment. It emphasized that "[t]he parties had conducted discovery, and [that] no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." *Id.* at 326. At the same time, the Court stated that "[a]ny potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on

the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Id.*; *see* Fed. R. Civ. P. 56(f) (permitting a court to deny, or postpone ruling on, a summary judgment motion where "[i]t appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition").

3. Though the court of appeals relied on *Celotex*, the circumstances in Mr. Bethea's case do not resemble *Celotex*'s facts. *Celotex* involved a request for summary judgment only after significant discovery, which was not the situation in Mr. Bethea's case. The district court in Mr. Bethea's action had, in fact, cut off any discovery even before it started by granting the BOP's motion for a protective order. Thus, it is not enough to buttress the court of appeals' decision that *Celotex* permits the moving party to obtain summary judgment without presenting affirmative evidence where, after discovery, the nonmoving party cannot present sufficient evidence to create a triable issue. Since no discovery here occurred, such a rule would be inapplicable.

But the court of appeals decision arguably is defensible under a very broad reading of certain portions of *Celotex*. In this regard, *Celotex*'s statement about "premature" summary judgment motions being resolved through Rule 56(f) might be made to apply to Mr. Bethea's suit. If, under *Celotex*, simply moving for summary judgment without adequate support is sufficient to place on the nonmoving party the obligation to file an affidavit under Rule 56(f) or else risk defeat, then the court of appeals' decision conceivably could stand. Mr. Bethea, having proceeded *pro se* in the district court, offered no Rule 56(f) affidavit in response to the BOP's unsupported motion.

The problem with that approach is that it necessitates the overruling of *Adickes*. The nonmoving party filed no Rule 56(f) affidavit in *Adickes*. The restaurant's motion for

summary judgment was insufficient to "carry its burden of showing the absence of any genuine issue of fact," and the Court required nothing in response from the nonmoving party. *Adickes*, 398 U.S. at 153. While *Celotex* conceivably might be stretched to sanction the court of appeals' view here that the mere "maintain[ing]" of a motion for summary judgment, prior to discovery, shifts the burden to the nonmoving party to make some affirmative presentation (such as filing a Rule 56(f) affidavit), that view is antithetical to *Adickes*. Pet. App. 4a. The court of appeals decision thus necessarily resolves any tension between *Adickes* and *Celotex* by, in effect, assuming that the latter supercedes the former.

That alone should be enough for the Court to grant review. Having reached a conclusion essentially to nullify one of this Court's decisions – *Adickes* – in favor of another one – *Celotex* – the court of appeals' decision transgresses the principle that only this Court enjoys the "prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The court of appeals' action is all the more alarming, and unacceptable, given that the Court in *Celotex* did not purport to overrule *Adickes*, instead relying on *Adickes* and distinguishing it rather than discrediting it. With the court of appeals having taken in Mr. Bethea's case, albeit implicitly, the road that this Court expressly shunned in *Celotex*, the Court should review the court of appeals' decision.

B. The Court of Appeals' Decision in This Case Conflicts with the Decisions of Other Circuits

The court of appeals' decision in this case is not the first to expose the friction between *Adickes* and *Celotex*. Several other courts of appeals – namely, the First, Fifth, Seventh, Ninth, and Eleventh Circuits – have directly confronted the matter, all concluding that *Adickes* survives *Celotex*. *See, e.g., Carmona v. Toledo*, 215 F.3d 124, 133-34 (1st Cir.

2000); *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1103-06 (9th Cir. 2000); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978-79 (7th Cir. 1996); *Russ v. Int'l Paper Co.*, 943 F.2d 589, 591-92 (5th Cir. 1991); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607-08 (11th Cir. 1991).

The Ninth Circuit's decision in *Nissan* is illustrative of these circuits' approach. Noting the "perceived tension" between *Adickes* and *Celotex*, but feeling itself "constrained to treat the cases as consistent," 210 F.3d at 1103, the Ninth Circuit in *Nissan* said:

> [U]nder *Adickes* and *Celotex*, a moving party without the ultimate burden of persuasion at trial may carry its initial burden of production by either of two methods. The moving party may [as described in *Adickes*] produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may [as occurred in *Celotex*] show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan, 210 F.3d at 1106. In every case, however, the moving party must "carry its initial burden of production" before the nonmoving party must make any showing. *Id.* at 1104.

For each of these circuits, *Celotex* has application only *after* discovery has been substantially completed. "*Celotex* did not hold that a moving party without the ultimate burden of persuasion at trial may use a summary judgment motion as a substitute for discovery. . . . The nonmoving party, of course, must have had sufficient time and opportunity for discovery before a moving party will be permitted to carry its initial burden of production by showing that the nonmoving party has insufficient evidence." *Id.* at 1105-06. "Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark*,

929 F.2d at 608; *accord Carmona*, 215 F.3d at 133 ("A moving party may not satisfy its initial burden of production . . . [by pointing to the insufficiency of the nonmovant's case] if the non-moving party has not had adequate opportunity to discover material facts supporting its claim."); *Logan*, 96 F.3d at 979 ("[E]ven after *Celotex*, an unsupported – or 'naked' – motion for summary judgment does not require the nonmovant to come forward with evidence to support each and every element of its claims.").

The court of appeals' decision conflicts with these more considered decisions of the other circuits. The BOP filed exactly the sort of "naked" motion that the other circuits would find insufficient to support summary judgment. Notwithstanding that the BOP proffered no evidence to support its assertion that it did not act willfully in using inaccurate records to fix Mr. Bethea's security classification and that no discovery had occurred, the court of appeals shifted the burden to Mr. Bethea "to demonstrate that a material issue of disputed fact exists regarding whether the [BOP] had 'acted intentionally or willfully.'" Pet. App. 5a. Whereas the other circuits have found "the Court in *Celotex* did not hold that any time a party with the burden of proof at trial is faced with a motion for summary judgment it must come forward with competent evidence to support its theory of liability, regardless of what showing the movant has made," *Russ*, 943 F.2d at 592, the court of appeals here reached exactly the opposite conclusion.

In short, this case would have come out differently if it had arisen in another circuit. To resolve the conflict that the court of appeals' decision creates with the other circuits on summary judgment standards, the Court should grant review.

C. Because of the Tension Between *Adickes* and *Celotex*, There Is General Confusion on the Litigants' Respective Burdens under Summary Judgment Practice

Not only should the Court grant the petition for certiorari in order to resolve the conflict among the circuits, it should use this case as a vehicle for providing guidance to the lower courts on the necessary burdens of production under summary judgment practice. Because *Adickes* and *Celotex*, at the surface, appear at odds on the question whether a nonmovant has the obligation to produce evidence in response to an unsupported motion for summary judgment, the lower courts have labored in cases where the movant has filed a motion without affirmative evidence accompanying it. The Ninth Circuit has noted that "the two cases have caused some confusion in the lower courts." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1103 (9th Cir. 2000). The Seventh Circuit has commented that the cases have led to "unfortunately common error[s] in the application of summary judgment review." *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996). And the First Circuit has said that the governing principles are not "easily applied," in light of *Adickes* and *Celotex*. *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000).

The commentators have likewise opined that *Adickes* and *Celotex* leave the lower courts grappling with the appropriate standards for summary judgment. *E.g.*, Adam Price, *Reconsidering Celotex: What is the Burden of Production When a Defendant Moves for Summary Judgment on the Ground that the Plaintiff Lacks Evidence?*, 11 Utah B.J. 14 (May 1998) (*Celotex* is "widely misunderstood" because the Court's "choice of language seems to suggest that a defendant may move for summary judgment simply by making a conclusory assertion that the plaintiff lacks sufficient evidence to reach a jury"); Samuel Issacharoff &

George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L. J. 73, 81 (1990) ("*Celotex* represents a retreat from the *Adickes* standard for summary judgment with regard to the burden of production that would be required of a movant for summary judgment."); Melissa L. Neiken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 Hastings L.J. 53, 65 & n.60 (1988) ("[*Celotex*] marks a substantial break with precedent regarding the initial burden on a party moving for summary judgment. . . . [*Celotex* and *Adickes*] cannot be squared in terms of the initial burden placed on the moving party."); John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problem Under Rule 56*, 6 Rev. Litig. 227, 247 (1987) (reconciling *Celotex* and *Adickes* as to the moving party's burden is "perverse because it rests upon an interpretation of the Rule rewarding [defendant] Celotex for remaining silent and punishing [defendant] Kress for attempting to satisfy a burden it did not have").

The Court should grant review in order to bring order to this area of the law. One of the commentators calculated that, by 1998, *Celotex* "ha[d] been cited as controlling or persuasive authority in over 34,000 published and unpublished judicial opinions." Adam Price, 11 Utah B.J. at 14. Indeed, summary judgment motions can potentially arise in every federal case. The Court should not countenance continued confusion among the courts as to the appropriate rules to apply when addressing such motions.

That the court of appeals' decision in this instance is unpublished should not make the Court hesitant to grant the petition for certiorari. The D.C. Circuit's rules now permit unpublished decisions to be cited as precedent, just like published ones. *See* D.C. Cir. R. 28(c)(1)(B). Moreover, it is in unpublished decisions that the errors in summary judgment review are most likely to surface. Deeming the

cases not to raise matters of sufficient importance to warrant published decisions, the courts (whether at the district court or circuit court level) are inevitably more likely to pay shorter shrift to the subtleties of the summary judgment standards in their unpublished opinions. Consequently, it is in the lower courts' unpublished opinions that the Court could most expect to be presented with serious errors in the granting of summary judgment motions, and a failure to review such unpublished opinions could allow a festering problem to go unchecked for many years.

Finally, the inequity and harshness of the result in this case makes it a particularly appropriate candidate for resolving the continuing difficulties raised by *Adickes* and *Celotex*. Mr. Bethea was a prisoner proceeding *pro se*; he sought discovery immediately after filing his complaint; upon the BOP's motion, the district court granted a protective order against all discovery, because of the likely future filing of a motion to dismiss; the BOP then filed a motion to dismiss, not a summary judgment motion; and the BOP never filed a listing of undisputed material facts as the district court's local rules would require for a summary judgment motion. Nonetheless, when the case reached the court of appeals, Mr. Bethea found himself losing on the ground that he had not supplied adequate evidence to defeat a supposed summary judgment motion. He lost on that ground, notwithstanding that the BOP had never provided any evidence in the first instance on the willfulness issue to support its motion to dismiss, the BOP all along had thwarted his efforts to obtain evidence in discovery, and no party had even briefed the particular issues concerning summary judgment burdens on which the court of appeals decided the case.

Regardless of what the court of appeals might have thought of the ultimate merits of Mr. Bethea's underlying claim, he was entitled to his day in court on it. Neither the BOP nor

the court of appeals was justified in, to use the term coined in *Celotex*, "railroading" Mr. Bethea's case with a premature motion for summary judgment. *See Celotex*, 477 U.S. at 326. The Court should grant review.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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JULY 2003

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5396 **September Term, 2002**
Filed On: March 3, 2003 [735292]

Terence Kevin Bethea,
Appellant

v.

United States Parole Commission
and Bureau of Prisons,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00824)

Before: EDWARDS and ROGERS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*

JUDGMENT

This cause was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of counsel. It is hereby

ORDERED and ADJUDGED that the district court's memorandum opinion and judgment filed

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October 24, 2001 be affirmed for the reasons stated in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Deputy Clerk

MEMORANDUM

Terrence Kevin Bethea appeals the dismissal under Fed. R. Civ. P. 12(b) (1) & (6) of his complaint against the Bureau of Prisons for money damages under the Privacy Act, 5 U.S.C. § 552a (2000).

I.

By Order of May 8, 2002, the court affirmed the grant of summary judgment to the United States Parole Commission and directed the parties to address whether Bethea, as a federal prisoner, was required to succeed in a habeas proceeding prior to filing his Privacy Act claim. The parties agree that the habeas issue is moot inasmuch as Bethea is no longer in federal custody and the court could render no effective relief in a habeas proceeding. *Cf. Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998). Hence, we do not

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address whether a Privacy Act claim involving a D.C. prisoner transferred into federal custody must proceed initially in a habeas writ.

The Bureau maintains, however, that before filing his Privacy Act claim Bethea was required to exhaust his remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2000) ("PLRA"), *see Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739-41 (2001); *Jackson v. District of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001), and that having failed to do so his claim is barred, notwithstanding his release from federal custody. Inasmuch as the PLRA's exhaustion requirement is not a jurisdictional bar, *see Ali v. District of Columbia*, 278 F.3d 1, 5-6 (D.C. Cir. 2002), we need not decide whether, in light of Bethea's release from custody, PLRA's exhaustion requirement still applies. *See* 42 U.S.C. § 1997e(a) & (h); *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999). Assuming Bethea was required to exhaust, the Bureau acknowledges that he now has exhausted his administrative remedies and Amicus Curiae states that if this court dismisses the complaint, Bethea could refile his Privacy Act claim in an amended complaint. Amicus Curiae Reply Br. at 17. Therefore, treating Bethea's complaint as amended to reflect exhaustion, *see Commercial Union Insurance Co. v. United States*, 999 F.2d 581, 586 (D.C. Cir. 1993) ; *Wolfe v. Marsh*, 846 F.2d 782, 785 n.4 (D.C. Cir. 1988); *see also Communications Workers of America v. American Telephone & Telegraph Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994), the question is whether Bethea stated a claim under the Privacy Act. *See Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002); *Deters v. United States Parole Comm'n*, 85 F.2d 655, 657 (D.C. Cir. 1996).

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II.

Bethea alleged in his complaint that the Bureau relied on incomplete and inaccurate records to determine his security designation and as a result he was not placed in a minimum security facility or a halfway house. Specifically, he alleged that the Bureau failed to investigate sexual assault charges reflected in a police report as well as an escape charge, all of which were never prosecuted. He also alleged that he was given a higher security classification because the Bureau considers all former D.C. prisoners to be dangerous.

On the merits, the Privacy Act claim fails because Bethea did not set out a sufficient factual basis to show that the Bureau's conduct was "willful" within the meaning of the statute. *See Deters*, 85 F.3d at 657. Anticipating possible reliance on materials beyond the pleadings in ruling on the Bureau's motion to dismiss, which attached an affidavit and various documents, the district court advised the parties that the motion would be treated as a motion for summary judgment. Amicus Appendix 248; *see also Fox v. Strickland*, 837 F.2d 507, 509 (D.C. Cir. 1988) ; *Richardson v. Rivers*, 335 F.2d 996, 998 (D.C. Cir. 1964). By Order of August 2, 2001, the district court, as required by *Neal v. Kelly*, 963 F.2d 453, 456-57 (D.C. Cir. 1992), advised Bethea, who was proceeding pro se, of the requirements under Fed. R. Civ. P. 56, including that he could not rely on the allegations in the complaint in opposing the motion to dismiss. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26 (1986); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C. Cir. 1988). In the memorandum accompanying its motion to dismiss, the Bureau maintained that Bethea could show neither that records allegedly missing from the Bureau's file would have altered his

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security classification nor that the Bureau intentionally and willfully violated Bethea's rights under the Privacy Act. Because summary judgment analysis considers documents beyond the pleadings, Bethea had an obligation to offer evidence supporting his claim that the Bureau acted willfully and intentionally. Bethea, however, presented no new information and relied solely on the factual allegations in his complaint, his opposition to the motion to dismiss raising purely legal issues. Because Bethea thus failed to demonstrate that a material issue of disputed fact exists regarding whether the Bureau had "acted intentionally or willfully in failing to maintain accurate records," an element of his Privacy Act claim, Deters, 85 F.3d at 657, the district court properly concluded that his lawsuit for damages could not survive. *See Sellers v. Bureau of Prisons*, 959 F.2d 307, 311 (D.C. Cir. 1992).

Accordingly, we affirm the grant of summary judgment to the Bureau.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Terence Kevin Bethea,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-0824 (GK)
	)	
Bureau of Prisons, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This Privacy Act case is before the Court on Defendants' Motion to Dismiss. Plaintiff seeks injunctive relief and damages from the Federal Bureau of Prisons and the United States Parole Commission for their use of allegedly erroneous records in their files stating that Plaintiff has a history of being a sex offender and has a prior escape charge. Having reviewed the Complaint, Defendants' motion to dismiss and reply, Plaintiff's opposition and surreply, and the entire record herein, Defendants' motion will be granted.

FACTS

Terrence Bethea is a District of Columbia prisoner currently confined by the Federal Bureau of Prisons. Mr. Bethea was convicted in the Superior Court of the District of Columbia in 1995 for attempted possession of cocaine with intent to distribute and sentenced to nine years in prison. Mr. Bethea was paroled in 1997, but parole was

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revoked on December 6, 1999 based on charges that resulted in his conviction in Maryland state court of second degree assault. The victim of the assault gave a statement to the police that he had been raped. Medical examination of the victim did not support this charge and other portions of the victim's statement did not appear to be credible. It is unclear from the record whether the Maryland conviction was later dismissed.

At various places in Mr. Bethea's prison and parole records, his parole violation offense behavior is listed as "rape." Other records detail the fact that Mr. Bethea was not convicted of rape and that the victim appears to have identified a different person named Terrence. These records were used by the Parole Commission on May 5, 2001 to deny Mr. Bethea parole and continue his custody to the expiration of his sentence. These same records were used by the Bureau of Prisons to determine his appropriate custody level which required his transfer from a Low Security Correctional Institution to a high level United States Penitentiary.[1] The Bureau of Prisons' determination shows that it increased Mr. Bethea's security designation for a history of escape based on a charge for failing to return to a halfway house in 1993. The escape charge was later dropped because Mr. Bethea had been involved in an automobile accident. Mr. Bethea filed this action against the Bureau of Prisons and the Parole Commission seeking an order to preclude the agencies' use of records that identify him as a sex offender.

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[1] After filing this complaint, Mr. Bethea was transferred to a medium-level Federal Correctional Institution.

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DISCUSSION

A. Standard of Review

Because Defendants' motion relied in part oil matters outside the pleadings. Plaintiff was informed that it may be treated as one for summary judgment and provided him with instructions on how to respond. See Order of August 2, 2001. Under Rule 56, Fed.R.Civ.P., summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party, here Defendant, is entitled to judgment as a matter of law. Rule 56(c) Fed.R.Civ.P. Material facts are those that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986). In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255; see also, Washington Post Co. v. United States Dep't of Health and Human Servs., 865 F.2d 320, 325 (D.C. Cir. 1989).

The non-moving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P 56(e); Celotex Corp. v. Catrett, 477 U.S. 317,324 (1986). The non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor. Laningham v. United States Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987).

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B. Defendants' Threshold Challenges

Defendants raise two threshold challenges to the Court's jurisdiction over this action based on their characterization of the pro se complaint as raising something other than a Privacy Act claim. The Court must liberally construe the factual allegations contained in pro se pleadings, Haines v. Kerner, 404 U.S. 519, 520 (1972), and may construe such complaints as asserting claims that are not precisely articulated. See, e.g., Richardson v. United States, 193 F.3d 545, 548 (D.C. Cir. 1999). Throughout the complaint and other papers filed by Plaintiff, he repeatedly takes issue with Defendants' actions that are not germane to his Privacy Act claim and prays for relief other than damages. But where the *pro se* litigant has clearly asserted what is fundamentally a Privacy Act claim for damages, citing the correct statutory subsection and the seminal case, it would be unjustifiably formalistic and rigid for the Court to construe the complaint otherwise unless mandated. With this principle in mind, the Court considers Defendants' threshold challenges.

1. Plaintiff's claims need not be filed as a habeas petition

Defendants argue that because Plaintiff challenges facts relied upon by the Bureau of Prisons in determining Plaintiff's security classification and his resulting custody level, and by the Parole Commission in making parole determinations, that this action can only be brought as a petition for a writ of habeas corpus because it challenges the "fact or duration of his confinement." Any habeas petition would most likely have to be filed in the district in which Plaintiff is confined. Chatman-Bev v. Thornburgh, 864 F.2d 804, 814 (D.C. Cir. 988); Bethea v. Zenk, Civil Action No.

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00-2618 (GK) (D.D.C. Feb. 26, 2001) (transferring habeas petition challenging action by Parole Commission to district in which petitioner is confined).

Defendants argue that Plaintiff's claim can only be brought as a habeas petition to the extent it has a "merely probabilistic impact on the duration of custody", citing Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 375 (D.C. Cir. 2000). Razzoli, however, applies only to actions filed by federal prisoners, not District of Columbia prisoners. Although housed by the Federal Bureau of Prisons, Plaintiff is considered a District of Columbia prisoner because he is presently serving a sentence imposed by the Superior Court of the District of Columbia. An action filed by a District of Columbia prisoner must necessarily imply or automatically result in a speedier release from prison to be required to be filed as a petition for habeas corpus. Anyanwutaku v. Moore, 151 F.3d 1053, 1055 (D.C. Cir. 1998).

Plaintiff's challenge to the BOP's custody classification would not accelerate his release from prison but, at most, could require that he spend his time in less intensive custody. Similarly, Plaintiff's challenge to the Parole Commission's use of certain evidence can be read as only challenging the Parole Commission's decision-making process and his resulting parole eligibility. To the extent that Plaintiff's Privacy Act claim can be read as seeking his release on parole, it cannot be heard except as a habeas petition in the district in which he is confined. Construing Plaintiff's *pro se* complaint liberally to steer clear of these limitations, the Court has jurisdiction to consider this Privacy Act case.

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2. Plaintiff need not exhaust administrative remedies

Defendants also argue that Plaintiff has failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). Jackson v. District of Columbia, 254 F.3d 262, 268 (D.C. Cir. 2001).[2] Exhaustion is only required, however, before a prisoner files a federal claim with respect to prison conditions.[3] As recognized by Defendants, a claim for damages under the Privacy Act cannot provide the additional remedy of changing plaintiff's security designation and, therefore, does not require exhaustion. See Defendants' Motion to Dismiss, at 11.

B. Privacy Act Claims

Defendants argue that Plaintiff has failed to establish facts to support a claim for damages under the Privacy Act and cannot obtain relief other than damages. The Privacy Act provides individuals with the right to "obtain access to

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[2] To exhaust his administrative remedies within the Bureau of Prisons, Plaintiff is required to file a grievance on a "BP-9" form, and file two levels of appeal using BP-10 and BP-11 forms. 28 C.F.R. § 542.11 *et seq*. According to the Bureau of Prisons, Plaintiff did not file any administrative remedies. See Declaration of James A. Vogel, Jr., IP 18. Plaintiff alleges that he attempted to file only a BP-10, but his completed form was confiscated by prison officials. See Plaintiff's Opposition, at 4. Plaintiff does not allege that he even attempted to file a BP-11.

[3] "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

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agency records pertaining to them, and to request amendment of any records they believe to be inaccurate, irrelevant, untimely, or incomplete." Doe v. Federal Bureau of Investigation, 936 F.2d 1346, 1352 (D.C. Cir. 1991). Agencies are permitted, however, to exempt certain records from specific provisions of the Privacy Act. 5 U.S.C. § 552a(j), (k); Doe, 936 F.2d at 1352. The Parole Commission records at issue are exempt from the amendment provisions of the Privacy Act, 28 C.F.R. § 16.85(a)(2), as are the Bureau of Prisons' records. 28 C.F.R. §§ 16.96(g), 16.97(a). Presumably recognizing this, Plaintiff has not asserted any claim, pursuant to 5 U.S.C. § 552a(d), for amendment of his Parole Commission and Bureau of Prisons records.

Instead, Plaintiff asserts claims for damages only pursuant to 5 U.S.C. § 552a(e)(5), (g)(1)(C) and (g)(4). Section 552a(e)(5) of the Privacy Act requires the agency to maintain records used in making determinations "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination [about the individual] "Section 552a(g)(1)(C) authorizes civil actions to enforce this section where "a determination is made which is adverse to the individual." Section 552a(g)(4) provides for monetary damages, costs and attorneys' fees where the agency has acted intentionally or willfully. Sellers v. Bureau of Prisons, 959 F.2d 307, 310-12 (D.C. Cir. 1992). Injunctive relief, however, is not available. Risley.v. Hawk, 108 F.3d 1396, 1397 (D.C. Cir. 1997).

Defendants have made determinations that are adverse to Plaintiff regarding his parole and custody classification, but these determination were based on records

that accurately reflected the uncertainty of the facts. See Szymanski v. United States Parole Comm'n, 870 F. Supp. 377, 378 (D.D.C. 1983) (elements of Privacy Act claim require identification of error). Plaintiff admits that he was charged with escape and that his assault conviction involved an allegation of rape, but vigorously disputes the accuracy of these underlying charges. Defendants' expressly based their decisions regarding Plaintiff's parole and custody classification on a review of both the records of the disputed charges and records contradicting the bases for these charges. Consequently, Defendants' records accurately reflect that the underlying allegations of escape and rape are disputed and uncertain. Nor can Defendants' decisions that rely in part on these disputed charges constitute inaccurate records for purposes of the Privacy Act. "The Privacy Act is not a vehicle for amending the judgments of federal officials, as those judgments are reflected in records maintained by federal agencies." Kleiman v. Department of Energy, 956 F.2d 335, 337-38 (D.C. Cir. 1992) (quoting Rogers v. United States Dep't of Labor, 607 F. Supp. 697, 699 (N.D. Cal. 1985)).

Nor has Plaintiff offered any evidence to support a finding that Defendants' actions in maintaining records regarding him were willful or intentional. Deters v. U.S. Parole Comm'n, 85 F.3d 655, 657 (D.C. Cir. 1996); see also Sellers v. Bureau of Prisons, 959 F.2d at 312. The willful or intentional standard is a high one: it is "something greater than gross negligence; an act without grounds for believing it to be lawful, or [an act done] by flagrantly disregarding others' rights under the Act; [a] violation . . . so patently egregious and unlawful that anyone undertaking the conduct should have "known it unlawful." Deters v. U.S. Parole

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Commission, 85 F.3d at 660 (internal citations omitted). Both agencies provided Plaintiff with an opportunity to submit information challenging his escape and rape charges. Moreover, the Parole Commission deferred its decision until it could obtain additional information from Maryland state authorities that clarified the nature and inconsistencies of the underlying allegations of rape. As a result, Plaintiff has failed to establish a claim for damages under the Privacy Act.

Although the dismissal of this action rests on the Privacy Act framework articulated by Plaintiff, it is consistent with the long-standing refusal of courts in this jurisdiction to review parole determinations and custody classification determinations except for an abuse of discretion. The Court does not review the merits of Parole Commission decisions, but only whether its decisions constitute an abuse of discretion. Bennett v. Ridley, 633 A.2d 824, 826 (D.C. 1993) (citing In re Tate, 63 F. Supp. 961, 962 (D.D.C.), aff'd, Fleming v. Tate, 156 F.2d 848, 850 (D.C. Cir. 1946)). This deferential standard is based in part on the lack of any liberty interest in parole created by the Constitution, see Greenholz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979), or District of Columbia law or Board of Parole regulations, see Price v. Barry, 53 F.3d 369 (D.C. Cir. 1995) (liberty interest not created by D.C. Code § 24-204(a)); Ellis v. District of Columbia, 84 F.3d 1413, 1420 (D.C. Cir. 1996) (liberty interest not created by 28 DCMR § 204.19-.21); McRae v. Hyman, 667 A.2d 1356, 1357 (D.C. 1995) (same). Because Plaintiff has no liberty interest in parole, there can be no liberty interest created by parole determination procedures. Brandon v. District of Columbia Board of Parole, 823 F.2d 644, 648-49 (D.C. Cir. 1987).

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Similarly, the Court "will not second-guess [Bureau of Prisons'] decisions in classifying" its prisoners. James v. Reno, 39 F. Supp.2d 37, 42 (D.D.C. 1999). Plaintiff does not have a liberty interest in his security classification, Meyer v. Reno, 911 F. Supp. 11, 17 (D.D.C. 1996), his place of confinement, Olim v. Wakinekona, 461 U.S. 238 (1983), or his access to specific prison programs, Women Prisoners of the District of Columbia Dep't. of Corrections v. District of Columbia, 93 F.3d 910, 927 (D.C. Cir. 1996). The Bureau of Prisons' classification decision was made pursuant to its authority and was well within its discretion. Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976) (no liberty interest in BOP's classification determinations); 18 U.S.C. § 4081.

Having failed to establish a Privacy Act claim for damages against either Defendant, the motion to dismiss will be granted. An appropriate Judgment accompanies this Memorandum Opinion.

/s/
Gladys Kessler
United States District Judge

Dated: October 23, 2001

APPENDIX C

UNITED STATES DISTRICT COURT
FOR-THE DISTRICT OF COLUMBIA

Terence Kevin Bethea,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-0824
	)	(GK)
Bureau of Prisons, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Motion to Dismiss [#16] is GRANTED; and it is

FURTHER ORDERED that JUDGMENT is entered in favor of Defendants. Any other pending motions are denied as moot. This is a final appealable order. See Fed. R. App. P. 4(a).

SO ORDERED.

/s/
Gladys Kessler

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5396 **September Term, 2002**
01cv00824
Filed On: May 2, 2003 [747326]

Terence Kevin Bethea,
Appellant

v.

United States Parole Commission and Bureau of Prisons,
Appelles

BEFORE: Ginsburg, Chief Judge, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Silberman, Senior Circuit Judge

ORDER

Upon consideration of appellant's and court-appointed *amicus curiae's* petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5396 **September Term, 2002**
01cv00824
Filed On: May 2, 2003 [747327]

Terence Kevin Bethea,
Appellant

v.

United States Parole Commission
and Bureau of Prisons,
Appelles

BEFORE: Edwards and Rogers, Circuit Judges, and
Silberman, Senior Circuit Judge

ORDER

Upon consideration of appellant's and court-ordered *amicus curiae's* petition for rehearing filed April 17, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Terence K. Bethea,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	01-824 (GK)
United States Bureau of	)	
Prisons, and United States	)	
Parol Commission,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, the United States Bureau of Prisons and the Parole Commission, hereby move to dismiss this case on the grounds that this Court does not have subject matter jurisdiction over plaintiffs claims and because he fails to state claim, pursuant to Fed. R. Civ. P. 12(b)(1) & (6). A memorandum in support of this motion and a proposed order are attached.

Plaintiff should take notice that any factual assertions contained in the affidavit and other attachments in support of defendants' motion will be accepted by the Court as true unless the plaintiff submits his own affidavit or other documentary evidence contradicting the assertions in the defendants' attachments. See Neal v. Kelly, 963 F.2d 453

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(D.C. Cir. 1992), Local Civil Rule 7.1(h) and Fed. R. Civ. P. 56(e), which provides as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

Respectfully submitted,

/s/
KENNETH L. WAINSTEIN
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United States Attorney

APPENDIX F

/s/
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/s/
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APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Terence Kevin Bethea,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-824 (GK)
	)	
Bureau of Prisons, and	)	
United States Parole	)	
Commission,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Introduction

In this Privacy Act case, plaintiff, Terence K. Bethea, asserts that the United States Bureau of Prisons (BOP) and Parole Commission (USPC) relied on "unsubstantiated police reports and indictments as well as other erroneous information" contained in their files to make determinations allegedly "adverse to plaintiff."[1] See Complaint (Compl.) at 1. As a result, he alleges that "the BOP and the USPC have

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[1] This is Mr. Bethea's second case before this Court. On October 30, 2002, he filed a Petition for Writ of Habeas Corpus that this Court transferred to the Middle District of Pennsylvania on February 26, 2001. See Docket Sheet, Civil Action 00-2618 (GK).

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labeled and designated plaintiff as a sex offender and as having an escape conviction when there is no evidence of their being a conviction on either issue." Id. at 2. Because of this, he contends that BOP placed him in administrative segregation and USPC denied his application for parole without a hearing. Id. at 11, 9. Consequently, he asserts statutory injury under the Privacy Act. Id. at 18.

The Facts

On June 6, 1995, Mr. Bethea, was sentenced by the District of Columbia Superior Court to a nine year term for attempted possession with intent to distribute cocaine. USPC Parole File for T.K. Bethea, 002, attached as Defendant's Exhibit (Def. Ex.) 1.[2] The District of Columbia Board of Parole paroled him from this sentence on January 8, 1997, to remain under parole supervision until July 18, 2003. Id. at 005.

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[2] Defendants submit the USPC's Parole File and the Declaration of James Vogel here for the limited purpose of allowing the Court to determine whether it has jurisdiction to consider Mr. Bethea's claims. It is well-established that when a defendant challenges the substance of the jurisdictional allegations, as defendants do in this case, it may use extraneous evidence to test those allegations without converting the motion into a summary judgment motion. See Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); Herbert v. National Academy of Sciences, 974 F.2d 192, 197-98 (D.C. Cir. 1992); Bonterra Americaylnc. v. Bestmann, 907 F. Supp. 4, 5 n.5 (D. D.C. 1995); see also Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995). Additionally, Mr. Bethea refers to the USPC investigation and report in his complaint. See generally Compl. By providing those documents, defendants simply provide the Court with the best evidence of their contents.

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Mr. Bethea was then arrested on July 28, 1998, by the Prince Georges County, Maryland Police Department for activities allegedly occurring on July 11, 1998. Id. at 27, 28. According to the complainant, Mr. Bethea, *inter alia*, forcibly entered the complainant's apartment, committed a sexual assault, and took his television. Id. On August 25, 1998, Mr. Bethea was charged with 2 counts of first degree sexual offense, 1 count of first degree assault, 1 count of second degree assault, 1 count of robbery, 2 counts of theft, and two counts of second degree sexual offense. Id. at 29-31.

On February 10, 1999, Mr. Bethea pleaded guilty to one count of second degree assault and one count of theft. Def. Ex. 1 at 32. He was sentenced to serve seven concurrent years on each count with all but one year being suspended. Id. Additionally, he was ordered to pay $300 restitution, was issued a stay-away-from-the-victim order, and was to be placed on probation for 2 years following release. Id.; see also Plaintiffs Exhibit (P1. Ex.) A.

On December 6, 1999, the D.C. Board of Parole evaluated Mr. Bethea's actions while on parole and revoked his parole from the 1993 offense. Def. Ex. 1 at 006, 013. It did so due to his failure to report as directed, failure to obey all laws, and failure to report his 1998 arrest to his parole officer. Id. at 024. The D.C. Parole Board instructed Mr. Bethea to undergo communications/ conflict resolution and sex offender therapy. Id. at 023.

Mr. Bethea was later transferred to the jurisdiction of the Bureau of Prisons and U.S. Parole Commission pursuant to the National Capital Revitalization and Self-Government Improvement Act of 1997. See D.C. Code §24-1231 (effective August 5, 1998). On April 19, 2000, pursuant to

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its request, the Parole Commission received a copy of the police report concerning the alleged sexual offense by Mr. Bethea. Def. Ex. 1 at 026-33. On May 31, 2000, the Parole Commission reviewed Mr. Bethea's parole status. Believing that the D.C. Parole Board did not make a finding of fact on the sexual offense charges, the hearing examiner decided to gather additional information regarding the circumstances of the alleged sexual assault before reaching a decision on Mr. Bethea's possible parole. Id. at 038. He recommended that the Commission secure additional information, but acknowledged that if the D.C. Parole Board had made a finding of fact, the Parole Commission would be bound by it. Id. at 035. In November, 2000, the Parole Commission received additional information from Prince George's County, including the complainant's statement to the arresting officers, Mr. Bethea's statement to arresting officers, and medical reports regarding the incident. Def. Ex. 1 at 042-62.

On March 13, 2001, the Parole Commission found that the evidence of sexual assault on the victim was insufficient to conclude that plaintiff had committed sexual assault. Id. at 065. It pointed to credibility problems with the witness in the record and an insufficient amount of evidence. Id. However, it did find that the complainant had been bound by Mr. Bethea in a robbery, as shown by wrist and ankle bruises in the hospital report. Id. at 069. Because such an offense falls into a category six severity rating under the re-parole guidelines, the Parole Commission ordered Mr. Bethea to serve until the end of his parole violation term and that, upon his release, be subject to special drug aftercare and alcohol abstention conditions. Id.

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B. Mr. Bethea's Incarceration.

BOP makes determinations about the level of security required for each inmate based on a variety of factors. See Plaintiff's Exhibit (Pl. Ex.) K, Chapter 8. It does so based upon a point system which considers such things as prior offenses, severity of the current offense, escape risk, and whether an inmate is a public safety risk (including a sex offender). Id. An inmate need not be convicted of a sex offense to be considered a sex offender, id. at Chapter 7, page 2, rather, an inmate that was charged with a sex offense but who, as a result of a plea bargain, was not convicted may be considered a sex offender. Id. Likewise, when an inmate pleads to a lesser offense, BOP attaches severity points to the greater offense for which he was charged. Id. Chapter 8, page 4.

Mr. Bethea was charged with two counts of first degree sexual offense, one count of first degree assault, one count of second degree assault, one count of robbery, two counts of theft, and two counts of second degree sexual offense. P1. Ex. A. He pled guilty to second degree assault and theft. Id. Upon his transfer from D.C. to BOP custody, he was initially assigned to the BOP Low Security Correctional Institute at Allenwood. See Compl. at 11. BOP then calculated his offense level and assigned him a total score of 18. Pl. Ex. N. He received seven points for the severity level of his current offense and its sexual nature, three points for his prior offenses, six points for history of violence (from his current offense and prior arrests), id., and two points for an escape history. See Compl. at 3 (Mr. Bethea didn't return as scheduled to a halfway house on July 9, 1993.) Consequently, BOP transferred Mr. Bethea to

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a medium security facility, Federal Correctional Institute at Allenwood. See Compl. at 1.

C. Mr. Bethea's Administrative Remedies

An inmate who wishes to challenge any aspect of his confinement may seek an administrative remedy from BOP. The agency has a three-level administrative process for formal review. Declaration of James Vogel (Vogel Decl.) ¶ 7, attached as Def. Ex. 2. This process involves the filing of a request for administrative relief (BP-9) to the Warden of the institution wherein inmate is confined. Id. In the event that the inmate is dissatisfied with the Warden's response, he may file an appeal (BP-10) to the Regional Director. Id. If the inmate is dissatisfied with that decision, the inmate may file an appeal (BP-11) with the Office of General Counsel of the BOP. See 28 C.F.R. §542.15.

Mr. Bethea has not used this appeal system. Vogel Decl., Exhibit B. Although he contends that he has filed a BP-10 to the Regional Director, Compl. at 12, BOP's records do not indicate that he has filed for any administrative relief. Vogel Decl., Exhibit B. Rather, Mr. Bethea has chosen to proceeded directly with this lawsuit. He now alleges that USPC and BOP have violated the Privacy Act by using inaccurate information to classify him as a sexual offender and an escape risk - increasing his security level and affecting his future prospects for halfway house placement. Compl. at 16. Because Mr. Bethea seeks to alter the fact and duration of his custody and the Privacy Act is not the proper vehicle for so doing, this Court does not have jurisdiction over this case. Moreover, inmates who have failed to exhaust administrative remedies are prohibited by the Prison Litigation Reform Act from obtaining relief in this Court.

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Therefore, Mr. Bethea's complaint should be dismissed in its entirety.

Argument

I. Mr. Bethea's Claims Against the Parole Commission Fail.

A. Mr. Bethea Cannot Challenge the Fact or Duration of his Custody Through the Privacy Act.

Mr. Bethea attempts to challenge the fact and duration of his custody by alleging that records held by BOP and USPC are inaccurate - resulting in his continued incarceration. See Compl. This is just the type of claim, however, that the Court of Appeals recently rejected. In November 2000, the Court of Appeals held that habeas corpus is the exclusive remedy for prisoners when a non-habeas claim would "have a mere probabilistic impact on the duration of custody." Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000). The Court determined that a prisoner's claim concerning the accuracy of documents underlying a decision concerning a parole date is not cognizable under the Privacy Act. Id. at 376. Because that is exactly what Mr. Bethea attempts to do here - despite the fact that this Court has already determined that it does not have jurisdiction over his *habeas* claims[3] - this Court should dismiss Mr. Bethea's most recent attempt to challenge his incarceration.

Moreover, the Privacy Act is not a vehicle for collaterally attacking quasi judicial, agency decisions. See Griffin v. U.S. Parole Comm'n, 47 F. Supp.2d 12, 16 (D.D.C. 1999) (issue in Privacy Act challenge is not whether

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[3] See Docket Sheet, attached as Def. Ex. 3.

prisoner was convicted of particular offenses but whether USPC had evidence before it that he had committed those offenses); Castella v. Long, 701 F. Supp. 578, 584-5 (N.D.Tex.), *aff'd* 862 F.2d 872 (5th Cir. 1988) (table), *cert. denied*, 493 U.S. 936 (1989) (the Privacy Act is not a vehicle for collaterally attacking judgments based on agency records); see also White v. United States Civil Service Com'n, 589 F.2d 713, 715 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 830 (1979) (inappropriate to use of amendment lawsuit to dispute work performance evaluations). The Privacy Act is primarily a vehicle for obtaining redress concerning issues involving government record-keeping. See 5 U.S.C. § 552a(g) (authorizing civil actions to amend inaccurate records, produce records improperly withheld, and pay damages for adverse determinations "willfully or intentionally" made on the basis of inaccurate records).[4] There are other mechanisms available to obtain judicial review of agency decision making.

As the Court of Appeals recognized in Razzoli, *habeas corpus* is the proper mechanism for attacking the fact and duration of incarceration. It is well-established that a federal prisoner's attack on the "fact or duration" of his confinement must be brought against his custodian in the federal district of incarceration. Chatman-Bey v. Thornburgh, 864 F.2d 804 (D.C. Cir. 1988) (en banc); In re

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[4] The elements of a cause of action for damages caused by an inaccurate record under section (g)(1)(C) are that: (1) a willfully or intentionally defective agency record, (2) caused, (3) plaintiff an adverse determination. See Deters v. United States Parole Com'n, 85 F.3d 655, 657 (D.C. Cir. 1996). It is the accuracy of the record, not the decision based in part upon the record, that is the focus of the action.

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Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988); Lewis v. Stempson, 737 F. Supp. 667, 669 (D.D.C. 1990); Hartwell v. United States, 353 F. Supp. 354 (D.D.C. 1972).

In Chatman-Bey, the Court stated:

> [The U.S. Supreme Court case of Preiser v. Rodriguez] . . . makes clear that, as a matter of Congressional intent, prisoners mounting a challenge to the lawfulness of their custody are to proceed by means of habeas.

Chatman-Bey, 864 F.2d at 809, *citing*, Preiser, 411 U.S. 475 (1973). In Guerra v. Meese, 786 F.2d 414 (D.C. Cir. 1986), the Court of Appeals held that a District Court may not entertain a habeas action unless it has personal jurisdiction over the custodian of the prisoner. See Chatman-Bey, 864 F.2d at 810, (reaffirming that "the appropriate defendant in a *habeas* action is the custodian of the prisoner"). Indeed, this Court transferred Mr. Bethea's habeas case to the Middle District of Pennsylvania earlier this year for these very reasons. Def. Ex. 3. Mr. Bethea should not now receive a second bite at the apple by filing a Privacy Act suit based on the same facts and circumstances.

B. The Parole Commission Complied With the Privacy Act When It Treated Mr. Bethea Fairly.

The Privacy Act requires that agencies maintain their records "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5) (emphasis added); Sellers v. Bureau of Prisons, 959 F.2d 307, 312 (D.C. Cir. 1992) (when information contained in records can be verified, the agency must take reasonable steps to maintain accuracy of information). It provides an

administrative and a civil remedy for the failure to do so. An individual may request that an agency administratively amend records that he claims are inaccurate under section (d)(2). 5 U.S.C. § 552a(d)(2). He may also bring a civil action to amend or correct inaccurate agency records under section(g)(1)(C), but may only collect damages if the agency "willfully or intentionally" failed to maintain accurate records. 5 U.S.C. § 552a(g)(4), Sellers, 959 F.2d at 312.

However, as a law enforcement agency, the USPC is exempt from the administrative amendment and civil action provisions of the Privacy Act by virtue of the regulations that it promulgated pursuant to section (j)(2). 5 U.S.C. § 552a(j)(2); 28 C.F.R. § 16.85. See Sellers, 959 F.2d at 309; Buxton v. United States Parole Com'n, 844 F. Supp. 642, 644 (D. Ore. 1994). Thus, USPC is only subject to section (e)(5), which requires that its records be as accurate "as is reasonably necessary to assure fairness to the individual" in its determinations. 5 U.S.C. § 552a(e)(5) (emphasis added).

USPC is an adjudicatory agency that achieves fairness by holding hearings. Morrissey v. Brewster, 408 U.S. 471, 488 (1972) (parole revocation hearing involves a final evaluation of contested facts and whether those facts warrant revocation). Those hearings provide prisoners with the opportunity to challenge the accuracy of the Commission's records as well as the fairness of its determinations. See Griffin v. Parole Comm'n, 47 F. Supp.2d at 16; Buxton, 844 F. Supp. at 644 (fairness requirement of section (e)(5) does not require the Commission to investigate a disputed presentence report, but only to review the information contained in such report and conduct a hearing).

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And, Privacy Act suits for damages under section (g)(4) do not require de novo review of the facts underlying the records to determine whether those records are accurate. In order to prevail on such claims, a plaintiff must show that the agency acted with more than gross negligence; that its action was so patently egregious that anyone would have known that it was unlawful. See Deters, 85 F.3d at 660 (Commission did not violate section (e)(5) where it offered plaintiff a hearing to address the accuracy of the record). An agency may withstand such suits by demonstrating that it followed procedures that were not "willfully and intentionally unfair." 5 U.S.C. § 552a(g)(4); White v. Office of Personnel Management, 787 F.2d 660, 663 (D.C.Cir. 1986) (OPM did not violate Privacy Act by retaining and relying on disputed performance evaluations that were based on a multitude of subjective considerations).

The Parole Commission fulfilled its Privacy Act obligation to Mr. Bethea by giving him notice of the adverse information it had received about him, a hearing on or about May 31, 2000, Def. Ex. 1 at 035, and a continuation of the hearing on March 13, 2001. Id. at 063-70. None of these were willfully and intentionally unfair to him. Far from it. The agency allowed Mr. Bethea to testify on his own behalf and to rebut the allegations giving rise to the hearing. See Def. Ex. 1 at 034-40. When serious questions about the accuracy of the information concerning Mr. Bethea were raised, the Parole Commission conducted an additional investigation and received more information about the conduct that had resulted in revocation of his earlier parole. See Def. Ex. 1 at 042-62. Thus, Mr. Bethea had ample opportunity to contest the allegedly "inaccurate" records during the hearing process. This satisfied section (g)(4)'s

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fairness requirement. Indeed, as the Court of Appeals has stated, "[n]o fact-finder could determine on this record that the Commission 'flagrantly disregarded' [plaintiff's] Privacy Act rights when it supplemented his file with his rebuttal to the [challenged record] and offered him a hearing that would have addressed the accuracy" of the record. Deters, 85 F.3d at 660.

Because the Parole Commission offered Mr. Bethea the same protections, his Privacy Act claims have no merit.

II. Mr. Bethea's Claims Against BOP Also Fail.

For the same reasons that Mr. Bethea's claims against USPC fail, his claims against BOP also fail - he seeks to alter the fact or duration of his custody through a Privacy Act challenge.[5] See Compl.; Razzoli, 230 F.3d 371. Additionally, Mr. Bethea has failed to exhaust his administrative remedies. See Vogel Decl. Consequently, the Prison Litigation Reform Act (PLRA) does not allow him to pursue judicial remedies at this time. Booth v. Churner, --- U.S. ---, 2001 WL 567712 (May 29, 2001).

The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Booth Court considered the question whether an inmate was required to

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[5] As is the USPC, BOP is exempt from the correction and amendment provisions of the Privacy Act. See U.S.C. § 552a(j)(1); Sellers v. Bureau of Prisons, 1998 WL 105007 (D.D.C. 1988) (described in Sellers v. Bureau of Prisons, 959 F.2d 307, 309 (D.C. Cir. 1992)).

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exhaust available remedies where the institution was unable to provide the remedy the prisoner sought and answered the question in the affirmative. Booth, 2001 WL 567712 * 3. As a result, Mr. Bethea must first exhaust his administrative remedies at BOP before requesting relief from this Court. The Vogel Declaration establishes that he has not done so.

Moreover, while exhaustion is not required prior to bringing a damages lawsuit under section (g)(1)(C) of the Privacy Act, that section requires that Mr. Bethea prove that (1) a defective record (2) proximately caused (3) an adverse determination concerning him. Deters, 85 F.3d at 657. Mr. Bethea simply has not done so. See Compl. Instead, he speculates that were the records different he would be released to a halfway house, id. at 16, or paroled. Of course, speculation simply is not sufficient to state a claim against BOP and parole determinations are left to the Parole Commission.

In any event, BOP did not act without grounds for believing its actions were lawful, or with a flagrant disregard for plaintiffs Privacy Act rights. See Albright v. United States, 732 F.2d 181, 189-90 (D.C. Cir. 1984); Pl. Ex. K. Assuming, *arguendo*, that Mr. Bethea could satisfy the other prerequisites for a cause of action pursuant to 5 U.S.C. § 552a(g)(4), he has not alleged - nor can he allege - facts to support a finding of an intentional action or willful intent in maintaining the challenged records. He cannot show that BOP has maintained the challenged records in any manner other than as a legitimate effort to collect and preserve relevant information in the course of its duties.

Furthermore BOP has traditionally been given great deference from the Courts in matters of inmate classifications. See Sandin v. Connor, 515 U.S. 472, 483

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(1995). Consequently, his claims against BOP should be dismissed.

Conclusion

Mr. Bethea seeks a judicial order that BOP and USPC alter or amend their records so that Mr. Bethea's incarceration either shorten in length or end. Because he seeks a remedy under the Privacy Act without first obtaining relief in *habeas corpus* and exhausting his administrative remedies, his case should be dismissed. A proposed order is attached.

Respectfully submitted,

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